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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 166

THE TOLEDO PRESSED STEEL COMPANY,
Petitioner,

vs.

STANDARD PARTS, INC.,
Respondent.

No. 167

THE TOLEDO PRESSED STEEL COMPANY,
Petitioner,

vs.

HUEBNER SUPPLY COMPANY,
Respondent.

RESPONDENTS' BRIEF.

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THE DARROW-GARDEN PRINTING COMPANY, 310 WEST MONROE, CHICAGO

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RESPONDENTS' BRIEF.

PRELIMINARY STATEMENT OF FACTS.

These are suits for infringement of Patent No. 1,732,708 on a Burner for bomb type torches (flares) used as warning signals on highways and construction jobs.

The plaintiff (Petitioner here) filed two suits in the

Northern District of Ohio,—one against Standard Parts Inc. (October Term, 1938, No. 166 here), involving the "Belser" torch (or flare) and one against the Huebner Supply Company (October Term, 1938, No. 167 here) involving the "Kari-Keen" torch.

The cases were tried together in the Courts below.

In the District Court, the late Judge Hahn held the claims in suit valid and infringed (R. 32).

The Sixth Circuit Court of Appeals on December 7, 1937 reversed the lower Court by a unanimous decision and held the claims invalid for lack of invention—(93 Fed. (2d) 336).

Petitioner then filed Petitions for Writs of Certiorari and Motions to defer consideration. On October 10, 1938 both Motions were denied.

On November 7, 1938, in *Toledo Pressed Steel Company* v. *Montgomery, Ward & Company*, the Circuit Court of Appeals for the Second Circuit by a majority held the patent valid,—(99 Fed. (2d) 806). That cause is now pending in this Court upon Petition for Writ of Certiorari to the Second Circuit Court of Appeals,—*Montgomery, Ward & Company* v. *Toledo Pressed Steel*, No. 603.

Thereupon Petitioner filed a Petition for Rehearing on its Petitions for Writs of Certiorari in the instant cases, setting up the decision of the Second Circuit Court of Appeals and on November 21, 1938, its Petitions for Writs of Certiorari were granted.

Claims 2, 5, 11 and 12 were involved in each of the three cases. In No. 166, Petitioner relies on Claims 2, 5, 11, 12 and 13 and in No. 167 on Claims 1, 2, 5, 6, 7, 11, 12 and 13 (R. 49).

JURISDICTION.

Jurisdiction is based on

28 U. S. Code, Section 347

and on diversity of decisions as to the validity of the patent in the Sixth and Second Circuits.

ISSUES.

Is the Patent Valid?

Is the Patent Infringed?

Outline of Argument.

Invalidity.

The patent in suit is invalid because it involves no invention.

The device of the patent in suit consists of a hollow bomb-shaped body to receive fuel,
a wick tube in the top of the body, and
a cap to protect the flame, imperforate at the top and provided with flame outlet openings and air inlet openings.

The claims in suit are very similar.

Claims 6, 7, 11, 12 and 13 include a flange (called "disc" in Claim 7).

The alleged invention consists in putting an old flame protecting cap on an old torch.

The patentees manufactured the old torch which was the same as that of the patent. Desiring to protect the flame,

they put a cap over the exposed portion of the wick and provided it with air inlet holes and flame and smoke outlet holes.

Caps to protect the flame were readily available in the art of burners.

For instance in patents to

Billingham, No. 181,031.

Almond, No. 193,796.

Almond is a complete anticipation of all of the claims in suit.

Blake, No. 453,335.

Heston, No. 270,587.

Reekie, No. 192,130.

Kahn, No. 1,175,527.

The Withrow and Close experiments prove nothing. They could have been avoided by casual inspection of the available art.

If the patentees made an invention, it is not in the claims in suit.

Infringement.

There is no infringement if the claims be interpreted to cover the only advance in the art made by Withrow and Close.

ARGUMENT.

The Patent Is Invalid Because It Involves No Invention.

The Device of the Patent in Suit.

The Withrow and Close patent is found at Page 156 of the Record.

So far as the claims in issue are concerned, the patented structure consists of

A (bomb-shaped) body
(to receive kerosene)
a wick tube
in the top of the body, and
a cap
(to protect the flame)
imperforate at the top,
provided with flame outlet openings
and air inlet openings.

This is the device of Claim 1, except that the parts in brackets have been added for clarity.

The patentees use different names for the cap. Claims 1, 2, 6, 7, 12 and 13 call it a cap. Claim 5 calls it a guard and Claim 11 calls it a "means for enclosing a space".

Claim 2 is the same, omitting the wick tube.

Claim 5 is like Claim 1, except that it calls the wick tube a—"means to hold the wick in place",

Claim 6 is like Claim 1 with the addition of

"an outwardly extending flange in the region of the wick opening"

to which the cap is connected.

Claim 6 provides that the wick tube extends

"inside of the torch body".

We think this limitation immaterial. Petitioner may think it is. Claim 6 is not urged against the Bolser torch. The wick tube of Bolser does not extend

"inside"

the body.

Claim 7 is like Claim 6, with the "flange" defined as on the wick "tube".

Claim 11 is for a

"burner"

with a wick tube,

"a supporting and heating receiving flange",

and a cap (means) with lateral flame opening and "restricted" air inlet opening.

Claim 12, is like Claim 11,—the cap being in heat conducting relation to the flange.

Claim 13 is like Claim 12 with the flame opening

"even with the top of the wick"

and the air inlet

"lower than the flame opening and above the lower edge of the cap".

There is very little difference in the essence of the claims.

The alleged invention consisted in putting an old flame protecting cap on an old torch.

Both parts do what they always did.

This litigation is an interesting illustration of how by the skill of advocacy, so simple a thing can be given the appearance of importance.

To make the device of the patent, comprising the torch body, the wick tube and the cap, involved only a moderate exercise of mechanical skill.

Withrow and Close are officers of Petitioner.

The Patentees Were Manufacturing Torches With Exposed Wicks for Which They Claimed All the Advantages of the Torches of the Patent.

For awhile they made for McCloskey the torch of his patent, No. 1,610,301 (Testimony of Close, R. 77, bottom). That torch is illustrated in plaintiff's Exhibit 25, R. 204, and in the McCloskey patent, R. 279.

That had a bomb-shaped body 1, a wick tube 8, and a bushing 7, by which the wick tube was held in place in the body.

Close was the patentee of a similar torch, Patent No. 1,613,819, R. 281.

They manufactured a torch quite similar to that of the Close patent (Testimony of Withrow, R. 52) which is shown in Exhibit 4, R. 164.

They claimed for these torches they then made, the same advantages in withstanding wind and rain they now assert for the torch of the patent in suit.

The torch was sold as an

> "open flame warning signal for use at night on all street and highway obstructions" (R. 164).

Petitioner advertised that its torch of Exhibit 4, which it sold for some years before it put out the device of the patent in suit, would burn for 16 hours

> "in wet or windy weather and if the weather is mild, it will last about 30 hours by adjustment of the wick". (R. 164, next to the bottom paragraph.)
>
> "We never had one blow out. • • •" Testimonial, Petitioner's Circular Ex. O, R. 282.
>
> "The large wick assures a vigorous flame which withstands wind and rain." (R. 166.)
>
> "The secret of all weather dependability." (R. 170. Ex. 8.)

While the patentees then held out to the public that their torches were the

"secret of all weather dependability",

they now declare to the Court that they were receiving complaints from users of the torches.

Plaintiff's Exhibit 5 is a package of complaint letters. Extracts from these letters were read into the Record, pages 52-56. The extracts show that most of the complaints were that the torches were put out by wind and rain.

Patentees' Problem.

It therefore became the patentees' problem to provide means for protecting the flame, so that it would not go out in wind or rain.

What they did was to put a cap, like a small inverted tin can, over the wick, and cut holes in the cap to admit air and cut other holes to emit flame and smoke.

This was the sum total of their creation.

They did the perfectly natural and obvious thing. They wanted a flame protector for a torch subject to contractors' rough usage. They put on a metal cap and provided it with air holes and outlet holes, as had always been done with flame protectors.

To put on this cap required no invention.

Caps to Protect the Flame Were Readily Available in the Art of Burners.

The lamp and burner art was a well filled one.

The torch body with the wick tube was in their hands.

Had they looked around among the lamps and burners of the prior art, they would have found any number of hoods and caps and chimneys adapted to protect the flame from wind and rain.

They would have found in every old kerosene lamp a glass chimney for wind protection set on a burner that had air inlet holes. The chimney was open at the top to let products of combustion out.

Billingham Patent, No. 181,031.

The Billingham patent, No. 181,031, of 1876 (R. 235) shows a wick type torch with a tube-like metal cap D screwed onto the torch body. This cap D has "perforations *d*" in its lower part, which the patentee says

> "are intended to allow air to be supplied to the flame to support combustion" (P. 1, col. 2).

The cap D has in its upper part

"perforations *h*"

and the flame issues therefrom. (P. 2, Col. 1.)

The cap D has an imperforate top J below which is a flame deflecting disc *i*, which

> "prevent the extinguishment of the same from rain or other causes." (P. 1, Col. 2.)

Here was the torch body B with a wick tube *c* in the top, and a metal flame protector with air inlet holes and flame outlet holes.

Petitioner urges that the Billingham structure was such as to keep the flame inside. If that is true, then Petitioner's alleged invention consisted in making the cap shorter so the flame would be certain to emerge.

This was not much in view of Billingham's repeated suggestions that the torch did emit flame. (P. 1, Col. 2, line 16 from bottom; P. 2, Col. 1, line 8.)

Almond Patent, No. 193,796.

The Almond patent, No. 193,796 of 1877 (R. 241) meets every claim in issue.

Almond's lamp was intended for heating.

So he provided an outer perforated tube G to retain heat and upstanding brackets J to support a cooking vessel. On removing the tube G the lamp becomes an illuminating one.

Following this brief, in an appendix, is a photostat of the structure of Figure 1 of Almond with the tube G and the brackets J omitted, and without showing the flame as in the Almond patent.

The Almond device has a body A with a wick tube B in the top. Surrounding the tube is a disc-like block E, not here material.

On the upper end of the wick tube B is a cap made up of several parts. We assume that the fact that this cap has several parts instead of one part is immaterial.

The cap is composed of the disc-like flange or plate F supported on a sleeve-like tube D, and provided with a peripheral

> "upwardly projecting rim, *b*" (P. 1, Col. 1, line 4 from bottom) (R. 242).

Resting on the rim *b* is a tube H (P. 1, Col. 2, lines 21-27).

The upper end of the tube H is closed by an imperforate top (cap) I (P. 1, Col. 2, lines 31-32).

The perforations in the "rim" *b* are air inlets (P. 1, Col. 2, line 8 from bottom).

The tube H

> "is perforated with holes of considerably larger diameter than the holes of the " " " rim *b*". (P. 1, Col. 2, lines 27-30.)

When the flame is low, it is confined within the tube H (P. 1, Col. 2, last paragraph.) When the flame is larger, it also burns outside the tube H of the cap. (P. 2, Col. 1.)

In Almond is everything that is in the claims in suit.

Almond—Applied to Claim 1.

May we now compare the Almond structure, as shown in the picture in the appendix hereto, with Claim 1 of the patent in suit.

Withrow and Close Claim 1	Almond
A torch body having an opening in its upper end	A
a wick receiving tube extending into said opening	B
a cap disposed on the outer side of said torch body to enclose the outer end of the wick	F-H-I
having an imperforate upper wall	top of I
lateral flame openings	holes in H
air openings below the flame openings	holes in *b*, the "rim" on F.

We note here that Petitioner cannot differentiate from Almond by urging that Almond's cap is not "disposed on the outer side of said torch body" (secured to the torch body) as in the patent in suit, because the accused device is like Almond in that its cap is on the wick tube above the torch body. (See Kari-Keen torch in second drawing in appendix.)

Either the claim defines that structure or there is no infringement.

Claims 2 and 5.

Almond meets Claims 2 and 5 similarly.

Claim 6 (urged only against Kari-Keen).

It meets Claim 6 which calls for the flange to which the cap is secured.

In order for the claim to cover the Kari-Keen torch

against which it is urged, that flange must be the bottom of the cap in Kari-Keen or the flange at the wick opening in Kari-Keen.

In its argument in the Sixth Circuit Court of Appeals, Petitioner said Kari-Keen had both and was therefore an infringer.

Petitioner was there a little hard put, because the upper flange (Kari-Keen's cap bottom) is not

"in the region of the wick opening"

as called for by the claim and the lower flange is not

"connected"

to the cap, as called for by the claim.

But in any event, Almond has both.

Almond has the cap bottom F like Kari-Keen and the

"lower flange"

so marked in the drawing following this brief.

Therefore Almond has the Kari-Keen arrangement whatever Petitioner's theory may be, and anticipates the claim.

Claim 7.

This is urged only against the Kari-Keen torch.

So far as we can recall, Petitioner has never attempted to specifically apply Claim 7 to the Kari-Keen flare (torch).

The claim calls for

"a disc adapted to embrace the wick, and having a flanged upper portion disposed in the region of said air ports".

These are the lower air ports.

We believe this is the

"disc 11a provided with an upwardly extending flange" (P. 2, line 11 of the patent)

shown in Figure 3.

The upwardly extending flange is the upper part of the wick tube.

If it is found in Kari-Keen, it is the wick tube itself ("flange" of the claim) (see drawing in appendix) with one of the flanges at the wick opening ("disc" of the claim).

So likewise is it the wick tube and "lower flange" of Almond, and Almond is a complete anticipation.

Claim 11.

Claim 11	Almond
A wick holder having a portion in contact with the wick	B
and a supporting and heat receiving flange	lower flange *or* cap bottom
means enclosing a space above said flange	*b*-H-I
except for the provision for lateral exit of flame and	holes in H
restricted entrance of air for combustion	holes in *b*

Claim 12.

Claim 12	Almond
A wick holder, having a portion in contact with the wick	B
and a lateral flange	F
a cap enclosing and spaced from the wick	*b*-H-I
having an imperforate top	top of I
and provision for lateral exit of flame	holes in H
and entrance of air	holes in *b*
the bottom of the cap being in heat conducting relation to said flange	the lower edge of *b* is integral with F

Claim 13.

Claim 13	Almond
A wick holder having a portion in contact with the wick and a laterally extending flange	B F
a cap over the wick having an imperforate dome-shaped top wall	*b*-H-I I
a lateral flame opening approximately even with the top of the wick	hole in H
a smaller opening for the inlet of air lower than the flame opening and above the lower edge of the cap	hole in *b*
said lower edge being in heat transferring relation to said flange	*b* and F

These claims read directly on Almond.

Petitioner's Attack Does Not Meet Almond

Petitioner urges that Almond would not function as an outdoor flare. This was Mr. Withrow's opinion (R. 132-133). He thought it would blow out and burn with a blue flame and with two flames.

Defendants operated a burner like Almond's with slightly different holes (Ex. G) and it burned just the same as the others (R. 96).

Petitioner's Brief, Page 19, calls attention to the Withrow and Close testimony that Almond's burner would not stay lighted in a moderate wind, and states that there is no evidence to the contrary.

This statement is incorrect as may be seen from the foregoing reference to Page 96 of the record.

Petitioner suggests in its Brief, Page 18, that Almond guarded against heating the wick and the fuel therein.

This statement is erroneous. What Almond did was to guard against overheating of the fuel chamber. Almond does in the last full paragraph on Page 1 of his specification say that he uses the wooden block E and that it and the tube D are covered by asbestos paper. However, he also says in the next sentence that the tube D terminates in a flange F. This flange F forms the bottom of Almond's cap and is in direct conducting relation with the cap, and, of course, with the tube D of which it forms a part and with the wick tube B surrounded by tube D. It must necessarily follow that if the cap gets hot, the wick tube gets hot.

Other Prior Patents.

Suppose we consider Withrow and Close as the traditional men skilled in the art, seeking to find a flame protector for a bomb-type torch.

If they want to go further than Billingham and Almond, they might look at

Blake, *et al.*, No. 453,335, 1891 (R. 247).

Blake shows a vapor burner. It uses a wick to convey the fuel to a point where the fuel is heated and then it burns the vapor but does not burn the wick.

The patentees recognize the desirability of protecting the flame, and so they say, page 2, line 78 of the patent specification:

> "It will be apparent that the slight flame formed when the valve D is closed * * * would be liable to be extinguished by drafts of air, and also that the large flame might be rendered unsteady and might be extinguished at some of the orifices momentarily by, air-blasts accidentally directed upon it if no protection were afforded for the flame. To afford such protection is the purpose of the shield C. This shield has the bottom C' perforated, as already described,

the intention being to admit an abundant supply of air to the flame, but to so thoroughly break it up that it shall be distributed evenly and not at any time reduced to a blast at any one point. The shield entirely encircles the burner-tip and is closed at the top, and has the apertures *c*2, which are radially in line with the apertures *b*3 in the burner tip B. The apertures *c*2 however are very much larger than the orifices *b*3, " " "".

Here is the cap of the patent.

Blake mentions the need for a protector and suggests a metal cap C with a closed top and with flame holes in the sides of the cap and air inlet holes in the bottom.

We note that the members B^4-B^6 of Blake form a cross and do not close the bottom of the cap.

Here then is a cap to fit over the wick tube or the burner tip and to allow the inlet of air and exit of flame.

When the patentees wanted a flame protector, all they needed to do was to read the Blake patent.

Blake showed an "Illuminating Burner", (P. 1, line 7) Therefore he must have intended the flame to emerge from the cap.

Let us assume that the Petitioner or anyone else interested in the problem of finding a wind and rain protector wanted to go a little farther than the Blake patent into the study of the art.

It would not take much investigation to find the patent to Heston, No. 270,587, R. 244.

This shows a gas burner in which the gas is fed upwardly through a tube R to a double walled cap B-C. There are holes in the walls and one wall is rotatable with relation to the other to control the passage of vapor through these holes.

The man who wanted a cap to protect a flame could glance at the Heston patent and find it.

A little further investigation discloses the patent to

Reekie, No. 192,130, R. 239,

showing a vapor burner of the wick type with a burner D, in the form of a hollow metal cap having an imperforate top and flame outlet holes near the top and air inlet holes near the lower part.

The patentee explains that the top of this cap is a flame deflector, that the gas issues into the core F (the lower part of the cap)

> "where the air inlets are located and where the gas is ignited and rising therein finds an exit beneath the deflector • • •"

It certainly would require only a modest amount of skill to find here a cap that would be a wind and rain protector.

However, a workman who was even careful, though not an inventive genius, might go a step farther in looking around to see what was available, and he would find the patent to

Kahn, No. 1,175,527, R. 260,

which discloses a burner for which the inventor provides

"hood elements".

He calls his burner a "head", and says that the hood elements

> *"are designed to encase any type of head* • • •"
> (Specification, page 1, line 77). (Emphasis ours.)

Kahn's hood is a hollow sheet metal cap with an imperforate top and with holes in the upper part of the side wall, holes in the lower part of the side wall, and holes in the bottom.

Here is the device of the Withrow and Close patent claims.

Illustrations of Art Available to Withrow and Close.

Following this brief in the Appendix, there is inserted a sheet entitled "McCloskey Torch with Caps from the Art", in which we have shown the McCloskey torch body with the caps of Almond, Blake, Reekie, Heston and Kahn. The torch is shown in yellow, the wick tube and flange in purple and the cap in pink.

In the upper row of figures, we have shown the various caps set down on the torch body, because this is the way the patentees mounted their cap on the torch body.

In the lower row, we have shown the caps mounted on the wick tube above the torch body, because this is the way the defendants mount their caps.

We beg the Court's indulgence in glancing for the moment at these drawings. They are on the second sheet following the brief.

It certainly took no degree of inventive genius to mount any of these caps on the McCloskey torch to provide protection from the wind and the rain.

There was no need for all the elaborate set of experiments which the patentees made. They would have gone faster had they opened their eyes and used the available art than they did by closing their eyes to the available art, and working out their own various forms of caps.

When they added any one of the caps from the prior art to the McCloskey torch, as shown on the drawing mentioned, they had the answer to their problem.

It may be that there would then be necessary some investigation to determine the right sizes for the holes for the air and the flame. To determine these sizes is certainly merely a matter of experiment.

The patent in suit does not explain what the sizes

should be, except to show that the flame holes are larger than the air holes. It affords no rule or formula, for finding sizes or proportions.

The Flange of Withrow and Close Was No Invention.

Petitioner emphasizes this flange, as a means whereby heat is conducted to the wick tube from the cap to cause the fuel to be heated till it forms a gas.

But the use of such a flange was no *invention*.

Once having decided to put a flame protecting cap on the McCloskey type torch, it was almost impossible to do it without having a flange that would serve as a heat conductor.

If one fastens the cap to McCloskey's collar in which the wick tube is mounted, the flange of the collar is a heat conductor.

If one sets a cap like Almond's or Blake's on the wick tube, the bottom of the cap is a flange which conducts heat.

The fact that the flange conducted heat was no discovery of Withrow and Close.

In the patent to Knowles, No. 22,771, issued in 1859 (R. 263) on a lamp, the inventor sought to provide means to reduce the burning (*carbonizing*) of the wick (P. 1, lines 18-27). He discloses a body to hold fuel, a wick tube *c* and a cap *i*, and a flange (deflector *f*, Page 1, line 66). The cap, which he calls another deflector, has air inlet holes *k* (Page 1, line 106), and a flame outlet hole in the top.

This structure reads on the claims in suit, except only that the flame hole is in the top instead of the side of the cap.

Knowles recognized the heating effect of the cap *i* and flange *f*.

He says that this cap and deflector form a chamber surrounding the lower part of the flame (that part in the cap)

> "so that the heat given out by this part of the flame heats the lower diaphragm deflector, which by conduction heats the chamber (g) below • • •"

Withrow and Close discovered nothing, either in the structure, or the functioning of the caps they used.

The McCloskey torch with a cap from the prior art has all the advantages of the Petitioner's torch.

It protects the flame against wind and rain.

That was the purpose of the Blake cap (No. 453,335, 1891, R. 247).

The cap heats the wick tube. It must do so if it gets hot.

It thus saves the wick, and gives the "economy" claimed for the Petitioner's torch.

Petitioner's Small Protected Combustion Chamber.

On Pages 23 and 24 of Petitioner's Brief is reference to the testimony of Olsen.

Counsel say Olsen

> "found a small protected combustion chamber in the bottom of the cap • • •"

If he means the space below the air inlet holes, it is obvious that no combustion occurs in the dead air space there.

Incidentally the Bolser torch, see drawing in Appendix, has no such space below the inlet holes, and if the claims are limited to it, Bolser does not infringe.

Withrow and Close Experiments Prove Nothing.

To meet the problem, the patentees say they started in the experimental route. They tried out various kinds of hoods and caps and finally hit on the one of their patent (R. 60).

Petitioner urges that the number of these experiments shows the difficulty of the problem and indicates invention.

Respondents suggest that the patentees simply went at their job in the slowest and most awkward way.

Had they looked to the readily available art, the experiments would have been unnecessary, because the answer to the problem was before them in the simplest form.

The fact that the patentees made numerous experiments to find a proper cap for their flare is no proof of invention, because there was no need for such experiments and the answer to their problem was readily available in the prior art.

Commercial Success.

Petitioner urges commercial success to show invention. We believe absence of invention is clear. Where that is true, commercial success can neither create nor dissolve a doubt.

John T. Riddell, Inc. v. *Athletic Shoe Co.*, 75 Fed. (2d) 93 at 95 (7th C. C. A.).

If Patentees Made an Invention, It Is Not in the Claims in Suit.

Referring to Claim 14 of the patent in suit, not in issue, and to Figure 3 of the patent in suit, it will be observed that Withrow and Close provided a peculiar collar 3a (called a "flange member", Page 2, line 16), one end of which screws into the top of the torch body and which is provided with an annular horizontal shoulder and an upstanding internally threaded part or flange.

The wick tube is made in two parts and has flanges 5a and 11a. The flange 5a rests on the shoulder of the member 3a. The cap 7 then screws into the member 3a and fits down on the flange 5a and thus locks the wick tube flanges in place.

Whether or not this particular arrangement constitutes an invention, we do not say, but it discloses the only advance made by Withrow and Close over the art, and it is *not the structure defined in the claims in issue.*

It should be borne in mind that we have heretofore treated the claims in issue as the Petitioner treats them and have given them that interpretation which Petitioner gives them in order to read them on the accused structures.

Infringement.

There is no infringement of any of the claims in issue if these claims be interpreted to cover the Withrow and Close structure just mentioned above, in which the flange on the wick tube is locked in place when the cap is screwed onto the body.

The Bolser and Kari-Keen burners do not embody that feature.

The Bolser Burner.

In the long sheet of drawings in the appendix, we have shown the Petitioner's burner and the Bolser burner.

It will be observed that in the Bolser burner, the cap has a reduced sleeve which slips down over the wick tube and there is no direct connection of the wick tube with the torch body, nor is there any arrangement by which the mounting of the burner cap on the torch body serves to hold the wick tube in place.

The Kari-Keen Burner.

Similarly in the Kari-Keen burner, the cap has a reduced portion mounted on the upper end of the wick tube and the cap is not mounted on the burner body directly nor does the mounting of the cap in any way function to hold the wick tube in place.

Therefore if the claims in suit be interpreted to cover the Withrow and Close sole contribution in which the cap screws into the member on the torch body and thereby holds the wick tube in place, then there is no infringement.

If the Supreme Court Should Affirm the Decision of the Second Circuit Court of Appeals on the Theory Followed by That Court, Still the Supreme Court Should Not Reverse the Instant Cases.

There is no real conflict in decision between the Sixth Circuit Court of Appeals and the Second Circuit Court of Appeals.

We do not purport to say what evidence was in the Second Circuit case, but the decision of the Court of Appeals of that Circuit seems to have turned upon evidence which the Court said was not in the record in the Sixth Circuit case.

Toledo Pressed Steel Co. v. *Montgomery Ward & Company*, 99 Fed. (2d) 806 at 807.

> "This record, however, contains evidence absent in the Standard Parts case, showing that the art was in search for this accomplishment."

and at Page 808:

> "That the problem required more than mechanical skill is demonstrated by the evidence and trials of those interested in its solution."

We respectfully submit that the decisions in these cases should not be reversed on account of evidence in the Second Circuit case, which these Respondents have never had an opportunity to meet.

Conclusion.

The device of the claims in suit is a very simple one.

It consists of an old torch body, having thereon an old flame protecting cap.

To place this cap on the torch body was all that defendant did and this did not arise to the dignity of an invention.

The decree below should be affirmed.

Respectfully,

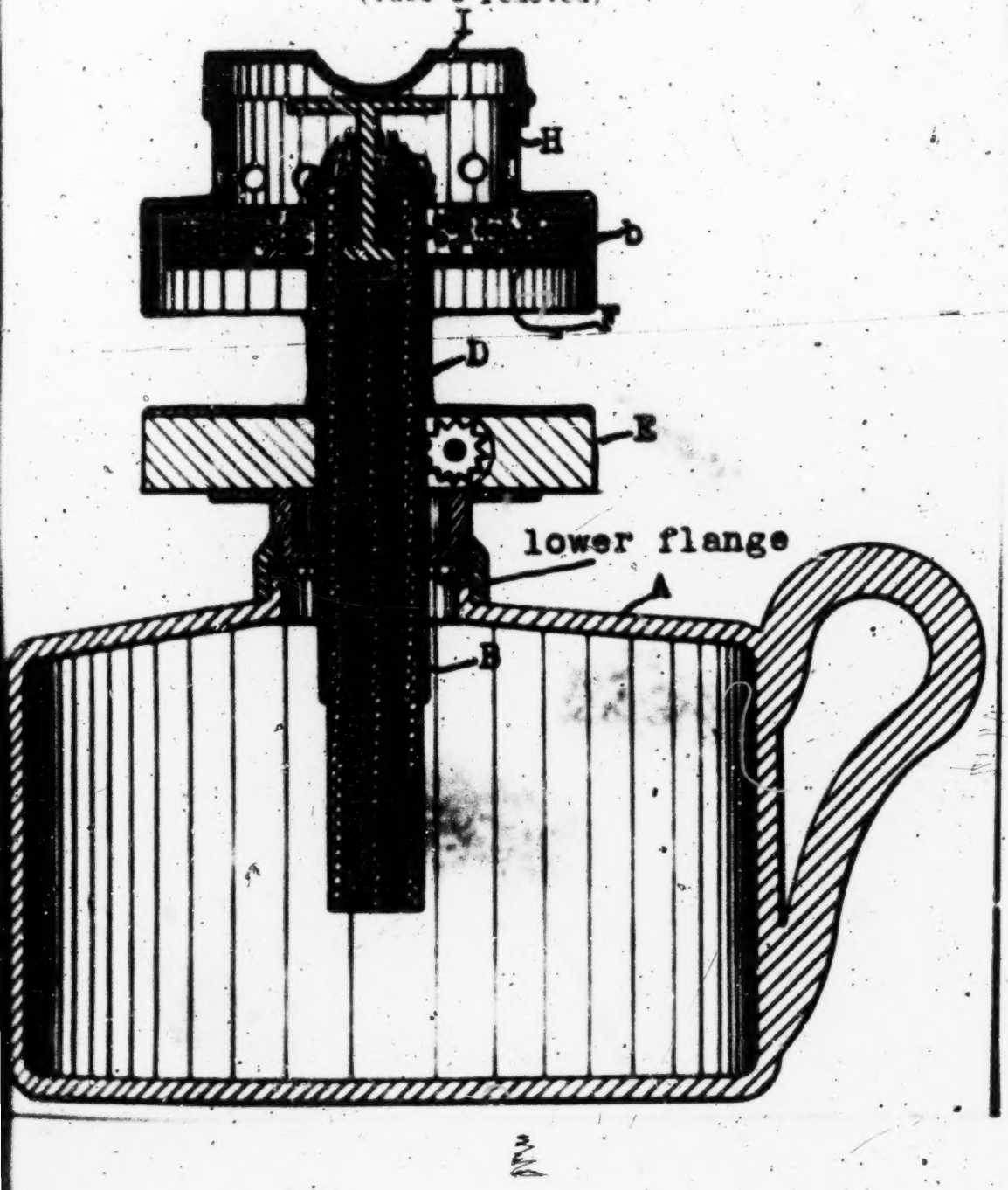
STANDARD PARTS, INC.,
and
HUEBNER SUPPLY COMPANY,
Respondents.

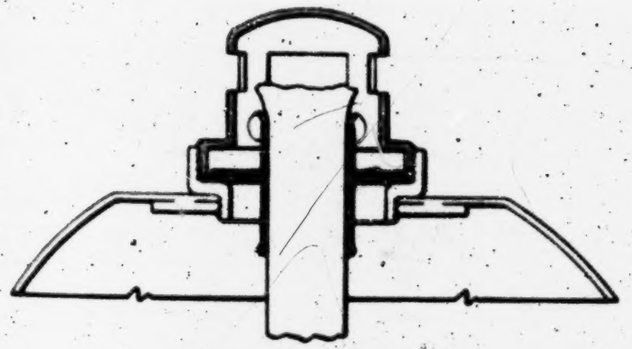
By BAIR & FREEMAN,
Their Attorneys.

W. P. BAIR,
Of Counsel.
Chicago, Illinois.

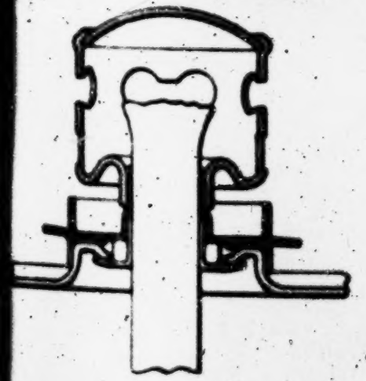
Part of Fig. 1 - Almond 138,796

(Tube G removed)

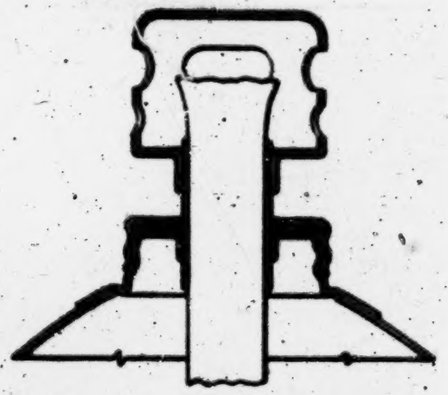




PLAINTIFF'S BURNER

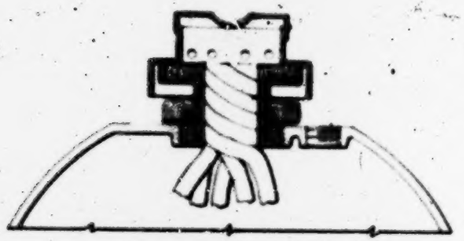


BOLSER BURNER

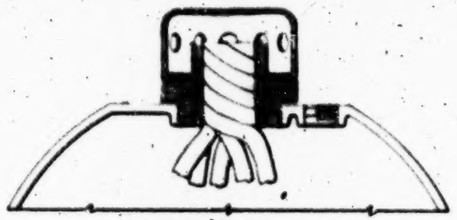


KARI-KEEN BURNER

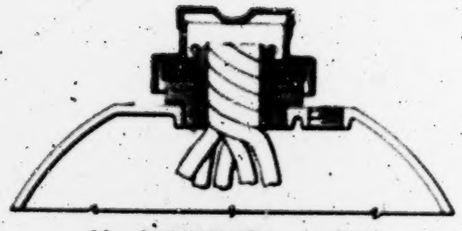
Mc CLOSKEY'S TORCH



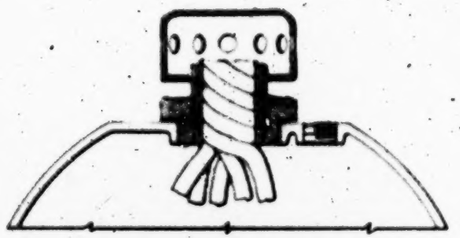
Mc CLOSKEY'S TORCH
ALMOND'S CAP



Mc CLOSKEY'S TORCH
BLAKE ET AL's CAP

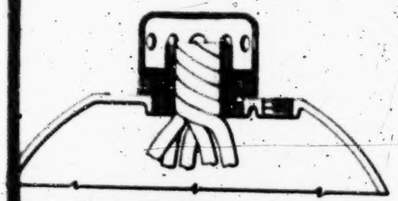


Mc CLOSKEY'S TORCH
ALMOND'S CAP

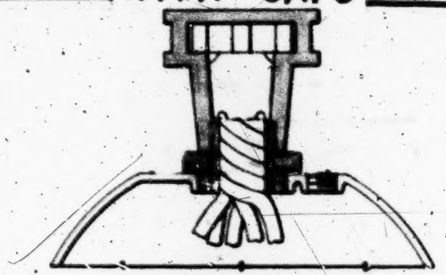


Mc CLOSKEY'S TORCH
BLAKE ET AL's CAP

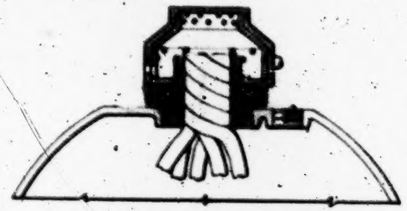
TORCH WITH CAPS FROM THE PRIOR ART



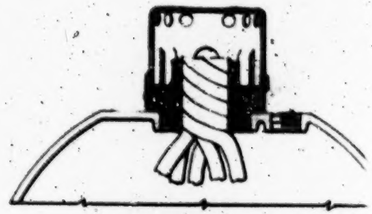
Mc CLOSKEY'S TORCH
BLAKE ET AL'S CAP



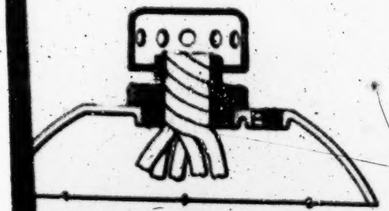
Mc CLOSKEY'S TORCH
REEKE'S CAP



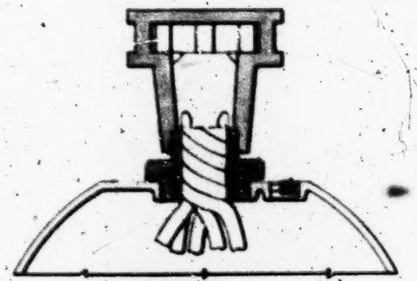
Mc CLOSKEY'S TORCH
WESTON'S CAP



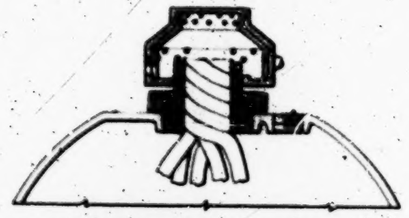
Mc CLOSKEY'S TORCH
KAHN'S CAP



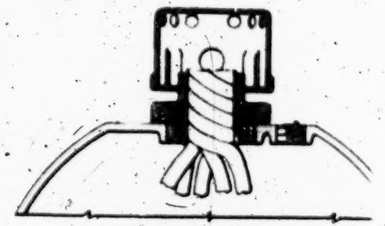
Mc CLOSKEY'S TORCH
BLAKE ET AL'S CAP



Mc CLOSKEY'S TORCH
REEKE'S CAP



Mc CLOSKEY'S TORCH
WESTON'S CAP



Mc CLOSKEY'S TORCH
KAHN'S CAP